United States Court of Appeals

for the Second Circuit

APPENDIX

74-2675

To be argued by:

LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- FREDDIE HILTON, Defendant/Appellant.	Docket No. 74-2675

SECOND SUPPLEMENTAL BRIEF
AND APPENDIX
FOR APPELLANT

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UNITED STATES OF AMERICA,

Appellee,

-against-

FREDDIE HILTON,

Defendant-Appellant.

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ISSUE PRESENTED

Whether the Prosecutor's failure to take proper notice of a producible Jencks Act letter, his decision that the letter be filed where it would escape his future review, and his failure to make a complete file search prior to trial, effectively usurped the function of the trial Court to decide what the defense should see, was grossly negligent and in reckless disregard of his prosecutorial duties, and deprived appellant of exculpatory evidence.

STATEMENT OF FACTS

Robert L. Clarey, the government prosecutor in the instant case, testified that his chief witness, Avon White, testified before the grand jury in January, 1974, and that shortly thereafter he received from White the handwritten letter of February 8, 1974, which is the subject of the instant litigation. (HA 10-11)*

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* "H.A." numbered references are to pages in the minutes of the first hearing on this issue on April 10, 1975. "H.B." numbered references are to pages in the minutes of the second hearing on September 9, 1975.

He wrote on the letter, "file United States v. Hilton" and left the letter for his secretary to file in the single file the office kept on the Hilton case. He would have directed his secretary to put the letter in "the Hilton indictment file.... the United States Attorney's file.... the file is on that, is on Mr. Behar's table right now." (H.A. 13,12-14). Not having filed the letter himself, he didn't have "the vaguest idea" where it was actually put, but the usual practice would have been to file it in the United States Attorney's "normal" file, a single binder folder (H.B. 29-30). He didn't respond to the letter or do anything else with it. (H.B. 8). **

He doesn't recall what he thought when he received the letter (H.B. 10); he doesn't know what was in his mind at the time he received the letter (H.B. 12); he doesn't recall what significance he attached to the letter (H.B. 14); he doesn't even recall reading the letter, although he must have read it since he remembered it immediately when a similar letter was called to his attention six months after the trial (H.B. 18-19, 39-40). He doesn't recall "coming to any such determination about what to do with the letter" (H.B. 22). He made no memorandum to himself to insure that the letter would not be forgotten; he made no efforts to see to it that the judge or the defense would see the letter (H.B. 24-25). "It never

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** The only thing he would have done with the letter is call the case agent, McCartin, but he doesn't recall doing so. (.H.A. 15) Avon White testified that agent McCartin mentioned to him that Clarey had received the letter when McCartin visited White at Sing Sing sometime prior to trial (H.A. 44). McCartin denied this. (H.B. 51)

occured to [him] to turn it over" to the judge or the defense (H.A. 23); he forgot about the letter without intentionally forgetting about it (H.B. 23). At the time he received the letter, five months prior to the trial, Avon White was his only witness who could put Freddie Hilton in the bank robbery. This situation remained throughout the trial (H.B. 15).

He did not see the letter in the file prior to the trial (H.B. 25). Although he understood his obligation was to turn over all 3500 and Brady material, he understood that obligation to extend only to major items like F.B.I. reports and grand jury minutes (H.B. 36). Thus, when 3500 material was demanded, his normal practice was to pull from his files the specific items such as F.B.I. reports and grand jury minutes, "which [he] would be familiar with" (H.B. 33). He looked only in the specific places in the file where he knew those materials to be (H.B. 37).

> "I wouldn't search through the entire file. I know where they are."
>
> (H.B. 33)

He did not go through the entire file to see if he had forgotten anything (H.B. 34); he apparently did not search that part of the file where the letter lay (H.B. 38), although immediately following the telephone conversation with AUSA Paul Bergman six months after the trial, AUSA Stephen Behar was able to easily locate the letter in the "normal" file (H.B. 52-53,

testimony of Bergman*).

At the time of trial, although the issue of White's mental stability was raised and White'a Matteawan records much litigated about, Mr. Clarey did not remember the White letter (H.B. 6-7, 17). During the trial, he did remember his own "deal" letter to White, which was also "probably in the file." He didn't have to search for that letter because it was "generally available." (H.B. 27-28) **

At trial, after 3500 material was given to defense counsel, Mr. Clarey stated for the record, "That's all I have." Defense counsel asked, "Is there no other statement, say, on the 26th of September of 1973?" Mr. Clarey replied, "If there is, I am not aware of it. I'll check on it...I'll check to see if there are others before, and get them to you, if there are, before Mr. White is cross-examined... But so far as I know, that is it." (T. 170)

Mr. Clarey was aware of his Brady obligation, but at trial, "the letter was not foremost in my mind. In fact, it was not in my mind at all, to be considered as Brady material or otherwise."(H.B. 16).

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* Bergman would not have "forgotten" this letter because he would have searched through every piece of paper in the file. (H.B. 54)

** At trial Mr. Clarey stated as to his "deal" letter : "I wrote a letter to Mr. White which sets forth exactly my and his understanding of any agreement he has at present. It is dated July 12, 1974. I will be glad to give a copy to Mr. Bloom at this time. I meant to give it to him before but I forgot." (T. 322-323)

ARGUMENT

THE PROSECUTOR'S FAILURE TO TAKE PROPER NOTICE OF A PRODUCIBLE JENCKS ACT LETTER, HIS DECISION THAT THE LETTER BE FILED WHERE IT WOULD ESCAPE HIS FUTURE REVIEW, AND HIS FAILURE TO MAKE A COMPLETE FILE SEARCH PRIOR TO TRIAL, EFFECTIVELY USURPED THE FUNCTION OF THE TRIAL COURT TO DECIDE WHAT THE DEFENSE SHOULD SEE, WAS GROSSLY NEGLIGENT AND IN RECKLESS DISREGARD OF HIS PROSECUTORIAL DUTIES, AND DEPRIVED APPELLANT OF EXCULPATORY EVIDENCE.

A prosecutor whose normal practice is not to search his files for all possible, relevant 3500 or Brady materials, and who relies purely on his own memory and judgment as to what will be turned over to the defense, and who regards only certain specific F.B.I. reports and grand jury minutes as material to be revealed, is grossly negligent when, upon receipt of arguably relevant 3500 or Brady materials, he totally disregards it, allows it to become hidden from further review by himself or the Court, and takes no steps to insure that his own initial snap judgment as to its worth, will not ultimately deprive the defense of significant impeaching or exculpatory evidence. Regardless of the judgment as to the degree of value to the defense of the hidden letter in this case (See appellant's first supplemental brief in this Court, arguing the significance of the letter), there is no question that, at least, the letter was material to the impeachment of White, and that the prosecutor was charged with noticing this fact. Indeed, the District Court in its previous memorandum opinion,

found the letter to be producible Jencks Act material, and this Court in its opinion ordering the instant remand said that the letter, "bears on credibility and bias" (United States v. Hilton, Docket No. 74-2675, decided August 8, 1975 slip op. at 5476). This being the case, the prosecutor was charged with a responsibility, which he completely avoided in this case, to keep the letter "generally available" (as he had done with the "deal" letter) for further review by himself as the trial and cross-examination of White approached. Instead, he made an immediate judgment on his own of the letter's worthlessness and took no steps five months prior to trial to see that it would remain in view. Although he maintains that he made no judgment about the nature or importance of the letter, his act in allowing the letter to disappear from his view indicates a judgment on his part, a judgment which this Court has said specifically he is not empowered to make.

> It is the policy of the Court that it, and not the United States Attorney's Office, will rule on the materiality of evidence which may be only marginally useful to the defense.
>
> United States v. Hilton, supra at 5474

He was charged with the responsibility of keeping the letter in view in a place where he would see it again and remember it again, and he was charged with the responsibility of

making a more considered judgment as the issues at trial developed, and of turning this letter over to the Court for its review if he determined that he did not want the defense to see it.

Thus, a finding that the prosecutor's negligence here was merely inadvertant is a finding excusing his cavalier disregard of material impeachment evidence and excusing his failure to make the requisite file search and excusing the total lack of prosecutorial procedures designed to prevent this disappearance of arguable Jencks Act and Brady material and abdicating to the prosecutor the Court's function to rule on these matters. Of course, the prosecutor is a busy man; of course, many letters cross his desk in a day, and of course, he may not have deliberately hidden away the letter, which was not exactly flattering to the credibility of his chief witness. The subconscious processes which contribute to forgetting detrimental matters, although well known to the field of psychology, are difficult of proof in a court of law. The defense should not need in a case like this to depend on the prosecutor's total absence of recall and protestations of innocent forgetfulness in order to establish the right to the fair trial which the Jencks Act and Brady were meant to insure. As Judge Friendly argued in the recent case of United States v. Morell, 2d Cir., No. 74-1827, decided August 29, 1975, slip op. 5873, 5887, "this would be an altogether too easy method to evade Giglio." This Court must condemn

the acts of omission revealed by the facts of this case, regardless of the superficially innocent intentions behind them. The prosecutor could well have supported those innocent intentions with simple procedures, but he failed to do so. That failure, we submit, has been fostered in part by the reluctance of the Courts to back up repeated warnings with, "the salutory effect inherent in a reversal and a direction of a new trial." United States v. Morell, supra (Friendly, J. concurring and dissenting at p. 5888).

> It is high time that United States Attorneys in this circuit took effective means to heed the Chief Justice's admonition in Giglio.... that, to the extent that requiring the right hand to know what the left hand is doing places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case, to every lawyer who deals with it. This should be particularly easy when, as in this case and many others, the material concerns the prosecution's chief witness.
>
> Ibid.

See also United States v. Estepa, 471 F. 2d 1132 (2d Cir., 1972) (Friendly, C.J.) ("We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help translate the assurances of the United States Attorneys into consistent performance by their assistants.") Until the decision is Estepa, this Court was

repeatedly confronted with prosecutorial neglect in the matter of grand jury hearsay, over which the prosecution had virtually ex parte control as he does when he receives Jencks and Brady materials. Repeated admonitions did not stop the cases. Estepa stopped them because the reversal finally caused the United States Attorney's office to establish procedures to insure against further reversals. This Court is aware of the endless series of cases of the "accidental" surfacing of witness letters after trial, which, despite repeated admonitions, is not being halted by the prosecutors themselves (see cases cited in first supplemental brief and United States v. Parness, Docket No. 75-1369). This Court can give appellant a fair trial and ensure it to others by heeding Judge Friendly and ordering a new trial in this case.

In Morell, supra, this Court remanded to the District Court for the determination of one fact, which, if proved, would require reversal and a new trial : whether the BNDD agent, who had possession of the withheld information, was aware of his obligation to give it to the defense. We submit that in the instant case, the prosecutor had the information in his possession, and was, at least at the moment of its receipt, aware of it.*

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* This is, after all, the crucial moment. At the moment of ex parte receipt of these kinds of materials, the prosecutor must be charged with making a decision for which he will later be held responsible. Otherwise he can, as in this case, file the letter in limbo and then later, albeit apologetically, claim he was not aware of the letter at the time of trial because he just forgot it. However, he buried it, and that was his decision.

Since he must, therefore, be charged with being aware of it, and since he actually knew that the defense had requested all such information,* and since as a prosecutor he is charged with knowledge that he had an obligation to turn over Jencks Act and Brady material, he is guilty of "gross negligence" and defendant must be accorded a new trial. United States v. Morell, supra, at 5880. He knew that his normal practice was not to make a complete file search prior to trial. Thus, when he simply directed his secretary to file it away, he was taking the chance the letter would not be found again. Since, under the law, this is not a chance he is entitled to take, and not the chance a reasonable prosecutor would take,** his action was in reckless disregard of his duties and a new trial is mandated.

CONCLUSION

FOR THE ABOVE STATED REASONS, AND THE REASONS STATED IN DEFENDANT'S MAIN AND FIRST SUPPLEMENTAL BRIEFS IN THIS COURT, THE JUDGMENT OF CONVICTION SHOULD BE SET ASIDE AND A NEW TRIAL ORDERED.

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*"[A request] serves the valuable office of flagging the importance of the evidence for the defendant and thus imposes on the prosecutor a duty to make a careful check of his files." United States v. Keogh, 391 F. 2d 138, 147 (2d Cir., 1968).

** See testimony of AUSA Paul Bergman at H.B. 54.

Respectfully submitted,

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APPENDIX

OPINION OF THE DISTRICT COURT

November 11, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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74 CR 54

UNITED STATES OF AMERICA

-against-

Memorandum of Decision and Order

FREDDIE HILTON,

Defendant.

November 11, 1975

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MISHLER, CH. J.

The court held a hearing pursuant to the mandate of the Second Circuit Court of Appeals dated August 8, 1975.[1] Robert L. Clarey, Peter Truebner, and Robert R. McCartin, witnesses who testified at the April 10, 1975, hearing, were offered for cross-examination by defendant's counsel.[2]

The opinion of the Court of Appeals noted that this court's memorandum of decision inferred but did not specifically find that the failure was inadvertent.[3] The court has reconsidered, in

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[1] On April 10, 1975, the court held a hearing pursuant to the order of the Second Circuit Court of Appeals, dated March 18, 1975, in the absence of Robert Bloom, Esq., counsel for defendant.

[2] Defense counsel also called Assistant United States Attorney Paul Bergman. Bergman testified that the existence of the letter was called to Mr. Clarey's attention while Bergman was preparing a footnote to the brief, and mentioned that the Office of the United States Attorney for the Southern District had discovered a letter written by Avon White to Assistant United States Attorney Truebner, who had tried an unrelated case in which White had testified. Mr. White had sent identical letters to Truebner and Clarey.

[3] This court found "Mr. Clarey placed the letter in the litigation file, but attached no significance to it . . . . Clarey forgot about the letter completely until he was advised that an Assistant United States Attorney had come across it while preparing the brief for the appeal." (Appellee's App. p.7). The letter was received and placed in the litigation file soon after February 8, 1974. The trial commenced July 15, 1974.

light of testimony elicited at the September 9, 1975, hearing, all the findings made in its memorandum of decision and order, dated May 2, 1975. Upon such reconsideration the court reaffirms those findings. The court expressly finds that (1) Mr. Clarey's failure to turn over the letter addressed to him by Avon White dated February 8, 1974, was inadvertent; (2) the letter was producible; and (3) the letter in the hands of skilled defense counsel could not have induced a reasonable doubt in the minds of the jury.

Defendant, citing United States v. Morrell, Nos. 1217-18 (2d Cir. August 29, 1975), charges Clarey with gross negligence mandating a new trial.[4] He asserts that Clarey was obliged to keep "the letter in view in a place where he would see it again and remember it again, and he was charged with the responsibility of making a more considered judgment as the issues at trial developed." (Defendant's brief, p.6)

Clarey glanced at the letter when he received it and directed his secretary to file it under the title of the case. He remembered the letter as White's complaint about the conditions of his commitment at Ossining Correctional Institution in solitary confinement. His secretary placed the letter in the general office file as distinguished from the files containing 3500 material. Clarey made a sincere and honest effort to turn over all the 3500 material under

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[4] In Morrell, the government failed to turn over a confidential DEA file on its witness Valdez, after a specific request for the information was made by defendant's counsel. The court believed that an evidentiary hearing would establish the high value of such material in cross-examination (Slip Op. p. 5878).

his control to defense counsel. He had forgotten receiving the letter and its contents soon after he received it. He did not recall receiving the letter or any portion of the contents until it was called to his attention, post-trial, by Mr. Bergman. I reject the notion that Clarey had an absolute obligation to keep the letter constantly in his view and in his mind. The court in Morrell said:

> " . . . The standards governing the grant of a new trial vary according to the extent of the government's culpability." (Slip Op. p. 5878-9).

The government proved that the failure to turn over the letter dated February 8, 1974, was inadvertant.

The memorandum of decision of May 2, 1975, as modified herein, is in all respects confirmed and it is

SO ORDERED.

U. S. D. J.